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No. 85-1722

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

[redacted]

**BRIEF AMICI CURIAE AND
BRIEF OF LEN MAREK, RIC JIMISON
AND DAVID GUY BROWN AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

STEVEN C. MOORE
Counsel of Record
WALTER R. ECHO-HAWK
Native American
Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Of Counsel
ROY HABER
138 West 17th Street
Eugene, OR 97401
(503) 485-6418

ATTORNEYS FOR AMICI CURIAE

46 pp

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**MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE**

Pursuant to Rule 36.1, Amici Curiae, individual Indian inmates incarcerated at the Idaho State Correctional Institution, respectfully move this Court for leave to file the attached

Brief Amici Curiae in support of respondents.

Amici have a vital interest in the resolution of the issues raised by petitioners in this case. Fundamental constitutional rights are at stake here. The degree of deference courts accord the judgment of prison officials, when assessing the importance of perceived penological interests, can in many instances unduly shift the balance in favor of the state to the injury of important religious interests.

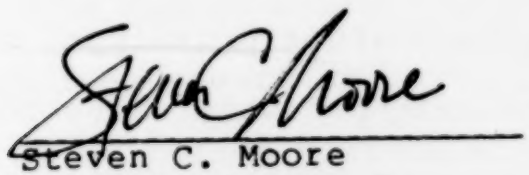
Because the first amendments rights of prisoners are implicated in this and similar cases, courts cannot shirk the responsibility to carefully scrutinize the claims of prison officials concerning the need to protect

institutional security. Adopting a standard of blind deference to the "expertise" of prison officials sends a clear signal to those institutions that the first amendment practices of prisoners are a privilege, not a right, to be extended only under conditions which serve the interests of institutional convenience.

Amici submit the attached brief to assist in showing the Court that well-established first amendment jurisprudence in the context of prisons does not countenance the result advanced by petitioners; that claims of institutional security, if sincere and valid, will withstand the scrutiny of litigation. But "penological myth" cannot be allowed to invade the free

exercise rights of prisoners, and trial courts should not be required to yield to it.

Respectfully submitted,



Steven C. Moore
Counsel of Record
Walter R. Echo-Hawk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Roy Haber
Of Counsel
138 West 17th
Eugene, OR 97401
(503) 485-6418

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST OF AMICI CURIAE..... 1

ARGUMENT..... 5

I. SUMMARY OF ARGUMENT..... 5

II. PUBLIC POLICY CONSIDERATIONS REQUIRE THE APPLICATION OF TRADITIONAL STANDARDS FOR ASSESSING STATE OFFICIALS' REASONS FOR INFRINGING ON THE RELIGIOUS FREEDOM OF CITIZENS.. 7

III. DEFERENCE TO THE DISCRETION OF PRISON OFFICIALS' PENOLOGICAL MYTH - CASE STUDIES.....13

IV. THE PRISON REGULATION DEPRIVES MUSLUM PRISONERS OF EQUAL ACCESS TO RELIGIOUS SERVICES PROVIDED TO JEWISH AND CHRISTIAN PRISONERS.....26

CONCLUSION.....36

TABLE OF AUTHORITIES

CASES — PAGE(S)

Cruz v. Beto, 405 U.S. 319 (1972)...8, 30

Gates v. Collier, 501 F.2d 1281 (5th Cir. 1975).....31

Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985).....18

McCellen v. Segler, 456 F.2d 266 (8th Cir. 1972).....30

Procunier v. Martinez, 416 U.S. 396 (1974).....19, 22, 23, 35, 36

Proffitt v. Ciccone, 506 F.2d 1020 (8th Cir. 1974).....16, 17, 19

Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).....29

Rhinehart v. Brewer, 360 F.Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974).....14, 16, 18, 19

Sherbert v. Verner, 374 U.S. 308 (1963).....27, 31, 33

Teterud v. Burns, 385 F.Supp. 153 (S.D. 1974), aff'd, 522 F.2d 357 (8th Cir. 1975)....3, 18, 20, 21

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).....10, 20, 21

Wisconsin v. Yoder, 406 U.S. 205 (1971).....10

CONSTITUTION — PAGE(S)

U.S. Constitution, First Amendment.....Passim

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Len Marek, Rick Jimison and David Guy Brown are Native American inmates incarcerated at the Idaho State Correctional Institute near Boise, Idaho. Messrs. Marek, Jimison and Brown have filed suit against Arvon Arave, Warden of the ISCI, and others, contending that the administration and operation of the institute deprives them of fundamental right of religious free exercise guaranteed by the first amendment to the United States Constitution. As such, they, like Native American prisoners nationwide, have a sincere interest in the decision of this Court in the instant case.

The Native American Rights Fund, the largest Indian legal rights organization in the United States, has devoted substantial resources during the past fifteen years to furthering rights of Native Americans to practice their religious beliefs in prison. The Native American Rights Fund and its Board of Directors, composed of Native American elders from across the United States, believe that many young Native Americans are in prison, in such dispropriate numbers to their numbers in the general population, in part because for several generations they were discouraged officially by the United States and unofficially through scores of policies of the federal government and state governments from practicing their religion. Native youth felt ashamed to practice their religion for years and consecuently developed a low self image, a major factor in criminal behavior. By instilling in young Native Americans the tenets of Indian religion such as a profound respect for Mother Nature, and for all living creatures, particularly

human beings, these future leaders of the Native American community will be rehabilitated from previous criminal behavior.

In the cases wherein the Fund represented Native prisoners seeking to establish the right to practice Indian religion, many of the same "undifferentiated fears and apprehensions" raised by the prison officials in this case were raised against the Indian prisoners.[1/] Having developed an expertise in assessing the often unsupportable conclusions of prison officials that the worst disasters would befall them if slight administrative concessions were made to Native prisoners, the Fund was able to develop full records which revealed that most, if

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1/ See, e.g., Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

not all of the fears were just that, mere fears expressed as "judgments." By utilizing expert testimony to evaluate the claims of prison officials the district courts were able to conduct an appropriate evaluation of the justifications of prison officials and arrive at reasoned decisions regarding their claims.

We urge the Court not to look accept the shibboleths enunciated by the petitioners, but rather to send this case back to the trial court with instructions to permit the development of a full and adequate record, a record which permits the prison officials to enunciate their fears and then to examine those fears utilizing cross-examination and expert testimony. Upon doing so, we believe it will become evident that the fears expressed by the prison officials in this case are not unlike the fears expressed

in cases the Fund has handled, where after the development of a full record, it became clear that such fears were "penological myths" created by the prison officials to avoid the administrative "hassle" of accommodating prisoners' religious freedom claims. Below we will review some of these claims in light of cases handled by the Fund utilizing its expertise in trying first amendment prison cases to aid the Court in seeing through what we believe are illusory justifications for denying fundamental constitutional rights.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The issues in this case are thinly veiled in illusory security claims. When separated from the rhetoric, what is plainly at issue here is the extent to which prison officials should be required

to make minor administrative changes to aid minority prisoners in obtaining access to a central religious practice. The subsidiary issue is the extent to which the courts will permit the development of records from which perceived major security problems can be examined. When fully scrutinized the claims of prison officials are often revealed as little more than justifications for a declination to go through the "hassle" of accommodating unpopular religious beliefs. This brief will look at those conclusionary justifications and the effects of the rule petitioners urge on the Court, which would essentially strip the federal courts of their traditional role of inquiring into state officials actions when such action infringes on fundamental rights.

As all of the parties have fully

briefed the traditional First Amendment cases and relevant prison cases, we do not repeat that here. This brief will emphasize, from the the standpoint of an organization that has litigated many prison cases, the flaws or myths of the various rhetorical standards urged by the petitioners and their amicus; the importance of using consistent standards to assess free access rights of all citizens; and some of the conclusionary justifications which under scrutiny are exposed as "penological myths."

II.

PUBLIC POLICY CONSIDERATIONS REQUIRE THE APPLICATION OF TRADITIONAL STANDARDS FOR ASSESSING STATE OFFICIALS' REASONS FOR INFRINGING ON THE RELIGIOUS FREEDOM OF CITIZENS

The state prison officials and their amici argue there is something unique about the prison setting which would justify this Court's deviation from applying the traditional tests used in

assessing free exercise issues.[2/] The following are the various rhetorical phrases which appear in the briefs in support of deviation from the traditional rule:

a. Prison officials must be given "wide ranging" latitude.

b. Prison officials must be free to take appropriate action.

c. Wide ranging deference must be given to prison officials to promulgate rules particularly within their province and expertise as prison officials.

d. Corrections is not within the province of the judiciary but more appropriately within the province of the executive and legislative branches.

e. The challenged practice must be viewed in light of central objectives of security.

f. Deference must be given if the security claim is arguably correct.

2/All parties agree that this Court has not yet ruled on cases wherein prisons free exercise rights are at issue. However, see Cruz v. Beto, 405 U.S. 319 (1972).

g. Courts are ill-equipped to deal with the increasingly urgent problems of prison administration.

h. It is necessary to defer to the informed discretion of prison officials and not substitute the court's judgments concerning operation of the prisons.

The basic theory behind these shibboleths, which seek to carve out an exception to traditional methods of assessing free exercise claims, is that there is something unique about prisons and the prison environment which requires a different standard. However, the argument is frought with sophistry.

Prison administrators do require unique knowledge of various disciplines and expertise to do the job properly. But no less unique is the knowledge and expertise of other public officials whose agencies' practices have been challenged in the past. For example, the combined wisdom of public educators regarding the

necessity for children to attend public schools up to a certain age according to traditional educational practices has not caused this Court to provide "wide ranging latitude" or to "blindly defer" to educators or the legislature, even when it was a crime to disobey. See Wisconsin v. Yoder, 406 U.S. 205 (1971). Educators are no less expert in their fields than prison officials. Yet educators were held in Yoder to providing some evidence that their reasons for infringing first amendment rights were more then "undifferentiated fear and apprehension." Why then why should prison officials be held to a lesser standard of proof? Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

The history of prison administration and the development of the law of prisoner rights offers some explanation

for the attempt on the part of the prison officials to try to convince the courts that a relaxation of the traditional free exercise balancing test is appropriate. We believe that the reason why the relaxed standard is sought is that, in fact, most of the justifications of prison officials have not stood the test of scrutiny in the past; that defendant prison officials are painfully aware that under the microscope of rigorous cross-examination the justifications of alleged security problems have and will continue to be exposed. It is not that the courts will be substituting their judgment for that of prison officials as complained of by the officials, but rather the trial courts will perform their traditional function under the American system of jurisprudence; namely, to evaluate all of the evidence presented to them to determine if prison officials

alleged security problems are illusory or real.

Virtually every prison system that has signed as amicus to petitioners has argued for federal court "hands off" deference in almost every case. The same official "experts" testified their systems were providing adequate security, shelter, medical care, etc. Yet the Federal Reporters are replete with case after case finding past deference to these experts has resulted over and over again in findings of "cruel and inhumane" punishments, inadequate security, housing and medical treatment.

The traditional methods of examining government intrusion into free exercise rights will protect the security interests of the institutions if they are real not imaginary. There is no justification for not requiring prison officials to present the type of proof

recuired of other state officials who have as much expertise in their areas as do petitioners here. Below we will demonstrate the effects of creating a lesser burden of proof on prison officials than on other state officials, including reviewing how decisions of this Court and others would have come out differently, if the prison officials were not required to shoulder their burden of proof.

III.

DEFERENCE TO THE DISCRETION OF PRISON OFFICIALS' PENOLOGICAL MYTH - CASE STUDIES

If the standards opted for by petitioners here are adopted by this Court we believe many of the security myths such as those advanced in this and other cases will go unchallenged and a great injustice to the religious rights of minority prisoners will result.

An excellent example of one case that

would have been decided differently, if the prison officials there had been required to do more than state conclusionary justifications for a restrictive jail policy, is Rhinehart v. Brewer, 360 F.Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974). Rhinehart involved an inmate who filed a pro se complaint challenging the hair regulations at the Iowa State Prison on religious freedom grounds.[3/] The

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3/The opinion is cited at length because it essentially articulates the views of the petitioners and their amici in this case.

> The Court concludes that the State has sustained its burden of showing a rational basis for restricting the hair length of inmates. First, granting inmates the freedom to wear their hair, including facial hair, in any manner of their choosing could lead to problems of identification. Security of the institution demands that prison officers be able to
> (Cont. on next page.)

reasons given by the prison officials - very similar to what petitioners here

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3/ (Cont.)

> readily identify inmates. Emergency situations requiring instant identification exist often enough so that prison officials should be given latitude to deal with them. That the present rule could cause identification problems is to the Court only a justification for an even more restrictive hair rule.
>
> Health and safety are also good reasons for the State to regulate the hair of inmates. Sanitation is a problem when large groups are confined in limited space. Additionally, inmates live and work around machinery and other mechanical devices which could pose safety problems to inmates with long hair. However, long hair makes for good grabbing when fights break out. Here, again, the Court emphasizes that the State is dealing with men who have refused to conduct themselves responsibly. These reasons, although perhaps not overly convincing, give the hair rule a sufficient rational basis. The Court will not substitute its judgment for that of prison officials who have superior experience in dealing with the realities of penal institutions. The State also has a legitimate interest

(Cont. on next page)

urge are "arguably correct reasons" which were accepted by the district court without more proof.

Shortly after Rhinehart, supra, the Eighth Circuit decided another pro se prisoner hair case. In Proffitt v. Ciccone, 506 F.2d 1020, 1021 (8th Cir. 1974) (J. Lay), the prisoner challenged on first amendment grounds a regulation of the Federal Bureau of Prisons requiring prisoners to wear their hair short. The district court dismissed the

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3/ (Cont.)

> in instilling discipline in inmates. These men have shown an unwillingness to adhere to society's rules. The State has an interest in seeing to it that these men can follow rules. When coupled with the State's interest in identification, security, health and safety, the matter of instilling discipline by use of the hair rule becomes a legitimate State interest. Stradley v. Anderson, supra.

Id. at 113.

suit and on appeal, Judge Lay sustained, finding that there was no need for a trial since there was no "factual dispute" and therefore "no evidentiary hearing was necessary".[4/] In Proffitt, then, the court was applying essentially the deference to prison official standard sought herein, i.e. that federal courts not second guess the sincerely held opinion of the warden, even when free exercise rights are at issue.[5/]

Shortly after Proffitt was decided,

4/The Bureau of Prisons had acknowledged in affidavit the rule and the need therefore, commenting on the fact that the Eighth Circuit had already decided two hair cases against prisoners.

5/Essentially, the standard sought for prison cases would be tantamount to a heretofore unknown exception to the adversary system, one in which prison cases regarding First Amendment rights would be reduced to cases for summary judgment. Under such a scheme defendants would need only articulate "facially" valid security reasons to prevail.

Teterud v. Burns, 385 F.Supp. 153 (S.D. 1974), aff'd, 522 F.2d 357 (8th Cir. 1975)[6/] was filed against the same warden as in Rhinehart v. Brewer, supra. Teterud alleged that the prison hair length regulation violated the first amendment rights of Native American prisoners to wear their hair in the tradition of the Great Spirit. This time around, however, the court was convinced

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6/In petitioner's Petition for Writ of Certiorari they stated that the Eighth Circuit has vacillated on the issues presented, first citing Teterud, and then Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985), stating that Hill "rejected" the Teterud standard. That is entirely incorrect. Hill reaffirms the Teterud standard that "undifferentiated" fear and apprehension "is not a sufficient ground for infringing on prisoners free exercise rights." The Hill court specifically found that the evidence established that the prison officials fears were more than undifferentiated. Defendants had, in Hill, met the burden that Teterud required; ergo, Teterud is still an accurate statement of the law in the Eighth Circuit.

that the deference previously given to the "superior experience" of the warden had resulted in an abandonment of the federal judiciary's role of scrutinizing prison security justifications. And the final result in Teterud was much different than that in Rhinehart and Proffitt.

Indeed, after the defendants' prison official took the stand and testified at length with regard to each of the justifications that had been accepted earlier in Rhinehart, the judge stated:

> A brief review of the evidence will readily demonstrate that the justifications advanced by the defendants for upholding the hair regulations are either without substance or unnecessarily broad in their sweep.7/

7/Citing Mr. Justice Marshall's opinion in Procunier v. Martinez, 416 U.S. 396, 424 (1974):

> The State has legitimate and

(Cont. on next page.)

Teterud v. Burns, supra, 522 F.2d at 361. And with regard to another "conclusionary justification" the judge found that:

> The record reflects that this may have been, at best, unsupported generalization

Teterud, 385 F.Supp. at 159.

In sustaining the district court judge's finding that the prison's justifications for the policy (earlier accepted in Rhinehart) were at best generalizations, the Eighth Court articulated the appropriate approach to

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7/(Cont.)

> substantial concerns as to security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large. But these considerations do not eliminate the need for reasons imperatively justifying the particular deprivation of fundamental constitutional rights at issue. Cf. Healy v. James, supra, at 180; Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).

review such claims of institutional security for infringement of free exercise rights:[8]

> The record does not show, however, that any increased administrative burden would be greater than that normally encountered when the constitutional rights of prisoners are enforced. . . undifferentiated fear and apprehension are insufficient to overcome rights asserted under the First Amendment. See Tinker v. Des Moines Community School Dist., 393 U.S. 503, 508-509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Bishop v. Colaw, 450 F.2d 1069, 1076 (8th Cir. 1971).

Teterud v. Burns, supra, 522 F.2d at 361-62.

There are scores of cases in which the allegations of security threats or other institutional concerns, when carefully examined in the crucible of litigation, have proved to have little more than a mere possibility of occurrence. For instance, Procunier v. Martinez, 416 U.S. 396 (1974), is a case which very probably would have been decided differently by this Court if the standard urged by petitioners here was applied. This issue was mail regulation and censorship. The prison officials articulated security and other concerns which were "arguably correct"; we can assume "sincere"; and were not patently absurd on their face to a lay person or trial judge.[9] Petitioners here,

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[8] The proof of the injustice of such a "hands off" approach as that articulated by petitioners and supporting amici here is that, in fact, the Bureau of Prisons changed its policy less than six months after testifying that the policy was absolutely necessary to maintain security and to identify prisoners. Teterud, supra, 522 F.2d at 362, note 12. The Bureau of Prisons, represented by the United States Justice Department (amicus here for petitioners), withdrew the policy after the Native American Rights Fund threatened suit. Should the Court give blind deference to such claims? We think not.

[9] For example, the prison officials concluded that letters which contained
(Cont. on next page.)

consistent with their position, would thus have to argue that these claims are sufficient grounds to reject the first amendment claims of the prisoners; i.e., that Procunier was wrongly decided.

But this Court sustained the lower court's refusal to blindly accept that which on its face seemed correct and required the officials to show how or why this doom might occur. The Court required more than the blind deference to the prison officials exercise of discretion sought here, holding that ". . . federal courts will discharge their duty to protect constitutional rights."

9/ (Cont.) "statements that 'magnify grievances' or 'unduly complain' are censored 'as a precaution against flash riots and in furtherance of rehabilitation. . . . and appellants defend the ban against 'inflammatory. . . . views' on the ground that 'such matter clearly presents a danger to prison security.'" 416 U.S. at 416.

Id. at 405. The prison officials were unable to present any proof other than an undifferentiated fear of security breakdowns. They were unable to show in what manner the alleged fears might come to fruition or how the exercise of the rights sought would have actually led to the feared security breaches. In short, if they were not required to explain how such claims as flash riots would occur, the excuse would have stood at the expense of the prisoners' first amendment rights.

It is important to note here that very few if any of the "penological myths" commonly utilized by prison litigants ever become reality. In other words, what credible evidence exists to trace a casual connection between long hair, special diets, or other special accommodations made in the interest of religious free exercise and breaches i

n institutional security, health, etc? Surely the day is long past when such folly can be allowed to stifle constitutional rights.

We urge that a fair reading of the scant record in this case, which the court of appeals correctly remanded for amplification, provides only conclusionary justification for the security and rehabilitation interests advanced by petitioners. On remand, a full record will likely reveal that the security claims are nothing more than "undifferential fear and apprehension."

Simply put, petitioners cannot prove that letting 20 prisoners through the gates will cause any real problems beyond the mere "inconvenience" associated with the routine movement of inmates or others in and out of the prison. Cross examination and the utilization of real "experts" in corrections will reveal that

there is no evidence to support the proferred security claims. Primarily the remand will reveal that this is, sadly, a case where the petitioners refusal to provide certain Muslim prisoners weekly access to a religious ceremony (which is not challenged as being a threat) is based on an effort to avoid minor administrative inconvenience and possibly minor costs to the state.

IV.

THE PRISON REGULATION DEPRIVES MUSLUM PRISONERS OF EQUAL ACCESS TO RELIGIOUS SERVICES PROVIDED TO JEWISH AND CHRISTIAN PRISONERS

In this case we have a prison which has its primary work week Monday through Friday. Saturday and Sunday are not work days for a majority of workers in the United States because they are the days of rest and prayer, on Saturdays for Jews and certain other religions, and on Sundays for Christian religions. No

citation is necessary . . . the Monday through Friday work week exists as a direct result of religious tenets.

Unfortunately for the Muslim prisoners in the instant case, their religious tenet requires them to observe a central prayer service on Friday, not Saturday or Sunday. This case involves a refusal by petitioners to make minor adjustment in the administration of the prison "to accommodate this highly important religious need." This is not the first time that this Court has been faced with state infringement of the free exercise of religion.

For instance, in Sherbert v. Verner, 374 U.S. 308 (1963), plaintiff was prohibited by her religious beliefs from working on Saturday. The state refused to provide her with benefits. It took the position that she was able to work on Saturdays and that her refusal was

voluntary. The Court stated:

> If the purpose or effect of a law is to impede the observance of one or all religions . . . it is infirm.

Id. at 404. The Court went on to note that refusal to provide benefits to the applicant resulted in

> pressure upon her to forego that practice . . . The ruling forces her to choose between following the precepts of her religion . . . and forfetting benefits . . . such a choice . . . puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Significantly North Carolina expressly saves the Sunday worshipper from having to make the kind of choices which we here hold infringes the Sabbatarian's religious liberty. Id.

Moreover, the Court held that:

> When the state seeks to justify the granting or withholding of benefits and privileges based upon religious classifications, the Equal Protection Clause of the Fourteenth Amendment demands that the state present compelling interest which is served by the discrimination.

Id. at 406, cited in Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).

Likewise in this case, the few Muslim prisoners who seek access to the Friday service are penalized in exactly the same way, but with more insidious overtones. Disciplinary action could be taken against them which could result in longer incarceration, if they choose to practice their religion. In order to practice their religion, Muslims cannot obtain the benefits of other minimum custody inmates such as Catholics who work outside the prison yet are free to practice their religion uninhibited by this policy.

Below we summarize and respond to the main reasons given for the state's refusal to aid prisoners in returning for their Friday service:

a. The rule setting up the outside work details was a result of "serious overcrowding." Insufficient staff to

deal with the overcrowding was a major reason for refusing to bring a few Muslim inmates (about 20) back into the prison.[10/]

One staff member accompanies the prisoners outside of the wall. Petitioners testified that they do not have enough staff to provide one guard to accompany the few Muslim prisoners in from the work detail and back out again

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10/ On remand, respondents would show that this justification is illusory. The New Jersey prison system employs hundreds of guards (admittedly not enough to provide adequate protection). The record will show that the failure of the petitioners to hire and train sufficient guards may present a real constitutional issue regarding providing minimally adequate protection for the prisoners, but utilizing the time of one guard for perhaps three hours each week bears no relationship whatsoever to any increase in security risks based upon petitioners failures to run a constitutionally adequate prison system. See Cruz v. Beto, 405 U.S. 310, 322 (1971); McCellen v. Segler 456 F.2d 266, 270 (8th Cir. 1972).

after the service.[11]/

The cost to the New Jersey prison system of a few hours of guard time is simply insignificant.[12]/ It is significant to note in this case, as this Court did in Sherbert, supra, that the petitioners expressly provide for access to the Christian services on Sunday. The

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11/On remand, the evidence will show that the number of security guard hours expended by petitioners to provide access to religious services such as Sunday mass is far greater than the number of man hours it would take to bring 20 prisoners back into the prison for a few hours. The extra guard there will be shown to be statistically insignificant with regard to any increased burden on the system.

12/If these petitioners have the problem they alluded to, one guard for three hours one day each week would mean nothing. If these petitioners are as concerned about overcrowding as they have articulated, they must reduce population or hire more security staff. See Gates v. Collier, 501 F.2d 1281 (5th Cir. 1975), and the scores of other cases against many of the prison systems appearing here as amicus to petitioners.

evidence on remand will show it takes more man hours to provide access to Sunday services than it would to provide for equal access for Muslim prisoners.

b. Another "serious" problem perceived by petitioners was that inmates could find a plethora of reasons not to go out to work under the old system that let them come back in during the day. This example is absurd on its face. There was no testimony offered to make the connection as to why it would be less likely for prisoners who could no longer come back during the day for religious services to make excuses for not going out than prisoners who could come back in.[13] Petitioners argue that

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13/On the face of it, it would actually seem more likely that the opposite would be true that there would be more excuses made if the prisoners had to stay out all day then if they could come back in.

prisoners who could come back in would make up fictitious reasons to come back in. In Sherbert, supra, the state defended its policy of not providing benefits to those who did not work on Saturday, saying that they feared there would be many fraudulent claims of Saturday worship. The Sherbert Court specifically found such an unsubstantiated claim insufficient to deny religious free exercise rights. 374 U.S. at 401.

c. Another conclusionary justification was that it takes time to conduct a strip search and that is "burdensome" on the guards. This is the most often used justification for inhibiting first amendment rights; staff burden "has almost become as shibboleth in prison law." As the Teterud court noted a "hassle" for the staff is hardly a reason to deny free access. 522 F.2d

at 361. The evidence on remand will show that the increase in work that may be caused by moving the few prisoners who seek access to Friday worship is miniscule, not burdensome, and that the petitioners can live with such minor inconveniences.

d. The most insidious reason given is that putting Muslim prisoners together creates "affinity" groups. The concept of "affinity" group is one used to explain groups of people who congregate for the purpose of antagonizing on confronting the prison administration. Thus, when petitioners label Muslim prisoners as an affinity group, it follows a fortiori that they are then thought of as a group that will confront and challenge authority. First, all religious groups attend Holy Mass as an "affinity group" (as used by petitioners). In addition, there are a

number of social and cultural groups at the prison, all of which have their own special interests and which continually vie for power, funds and favors. On remand, the record will show there is absolutely no evidence that these few Muslim prisoners as a racial and religious group pose any greater threat to the institution than do a number of white organizations, either religiously or socially oriented.[14]/

14/For example, on remand, the prison officials would be cross-examined on what they mean by confrontation and what example they could give of the type of confrontation they may mean. The records reflecting any type of "confrontation" which created a potential danger to the institution would be evaluated. The result on remand will be that the evidence will not support the facially appealing claims of confrontation. In Procunier the officials' claims of "magnify grievance"; "unduly complain"; "precautions against flash riots"; and fears of "inflammatory views" are all virtually the same superficially attractive, arguably correct reasons to stifle all first amendment activities were rejected by this Court, and under closer scrutiny found to be without any real foundation.

In sum, blind deference to the possible superior knowledge of prison officials is a truly illusory concept in that: a) prisons officials, many of whom are career prison guards who have risen in the ranks, are not "experts" as defined in the Federal Rules of Evidence; and b) deference to the officials should only mean permitting deference by the trial judge to their views if, in fact, they are able to provide evidence that the views have a foundation in the real world. As in Procunier, petitioners will not be able to testify that their facially attractive security threats bear any relationship to any valid expectation caused by real world experience.

CONCLUSION

We urge this Court not to lose sight of the underlying principle brought into sharp focus by this case: if the Court accepts that prisoners are citizens for

purposes of the free exercise clause, then rigorous scrutiny of the reasons given to infringe upon those rights must be made before infringement can occur. Deferring to the standard petitioner's advance violates the fundamental balancing tests this Court has always used when assessing intrusions into a citizen's free exercise rights. If the Court is inclined to adopt petitioner's position then it should very clearly hold that prisoners on longer have a right to the free exercise of religion while incarcerated; that it is no longer a right but a privilege afforded prisoners, and then only when it does not cause administrative inconvenience, as determined in the sole discretion of prison officials. This is at bottom the result petitioners seek. Amici respectfully submit that this result runs

contrary to well established first amendment jurisprudence and must be rejected. The decision of the Court of Appeals for the Third Circuit should stand affirmed.

Respectfully submitted,

STEVEN C. MOORE
Counsel of Record
WALTER R. ECHO-HAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Of Counsel:

ROY HABER
138 West 17th Street
Eugene, Oregon 97401
(503) 485-6418